

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

JEFFREY DELUCA, the Public Administrator  
of Nassau County, New York, as  
Administrator of the Estate of BAYRON  
ANDINO,

Plaintiff,

VS.

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action No. \_\_\_\_\_

**PLAINTIFF'S ORIGINAL COMPLAINT**

TO THE HONORABLE DISTRICT COURT:

COMES NOW, Hon. Jeffrey DeLuca, the Public Administrator of Nassau County, New York, in his capacity as Administrator of the Estate of Bayron Andino, Plaintiff, by and through his attorneys, William Schwitzer & Associates, P.C., and files this Complaint against the United States of America, and for causes of action alleges the following:

### NATURE OF THE ACTION

1. In May of 2016, the United States of America, through the Department of Health & Human Services, provided funding to medical clinics throughout the United States in areas where the resident population is underserved by private medical care. In May of 2016, Defendant specifically provided funding to Family Health Centers of Long Island FQHC, Inc. d/b/a “Hempstead Family Health Center,” a clinic associated with Nassau University Medical Center, located in the Hempstead section of Nassau County, State of New York. Physicians that

practice at the “Hempstead Family Health Center” enjoy immunity from suit pursuant to the Federally Supported Health Centers Assistance Act of 1992 and 1995 for any malpractice that may be committed while providing medical care at a federally funded clinic. Plaintiff brings the present action alleging, *inter alia*, negligence during the pediatric care Bayron Andino received at the Hempstead Family Health Center, and pursuant to 28 U.S.C. §1346(b).

### **JURISDICTION & VENUE**

2. The present action arises under the laws of the United States of America and the State of New York. The Honorable District Court has jurisdiction over this matter pursuant to 28 U.S.C. §1346(b), 28 U.S.C. §2401(b) and 28 U.S.C. §§2679-81, *et seq.* because the Defendant is the United States of America, by its agents, servants and employees, both actual and ostensible. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. §1402(b) because a substantial part of the events or omissions giving rise to this claim occurred in this district; to wit, Plaintiff resides in this district and the medical care made the basis of the present action, and the alleged tortious acts, occurred in this district.

### **CONDITIONS PRECEDENT**

3. Pursuant to 28 U.S.C. §2675(a), written notice of an administrative claim was timely sent via certified mail, return receipt requested, to Defendant through the Department of Health & Human Services at least six (6) months prior to the present action. On or about March 6, 2017, Defendant sent written notice to Plaintiff that the administrative claim was denied. Plaintiff now files the present action pursuant to 28 U.S.C. §2401(b).

### **THE PARTIES**

4. Plaintiff Hon. Jeffrey DeLuca is the Public Administrator of Nassau County, New York and has been duly appointed the Administrator of the Estate of Bayron Andino by the Hon.

Margaret C. Reilly, Judge of the Surrogate's Court for Nassau County, New York on or about May 9, 2016; and, maintains a principal place of business at 240 Old Country Road, Mineola, New York 11501. Griselda Andino is the mother and natural guardian of infant Decedent, as well as his sole distributee. Upon information and belief, Griselda Andino is not qualified to act as Administrator of the infant Decedent's estate.

5. The Department of Health & Human Services is a duly authorized agency of the Defendant with authority to fund and/or provide health care. Upon information and belief, Defendant United States of America provided funding to the Long Island FQHC, Inc. d/b/a "Hempstead Family Health Center," located in the Hempstead section of Nassau County, State of New York at 135 Main Street, Hempstead, New York 11550. Upon information and belief, Long Island FQHC, Inc. d/b/a "Hempstead Family Health Center," is a "Community Health Center" funded under Section 330(e) of 42 U.S.C. §245b (Public Health Services Act). Service of process may be had upon the Defendant by serving the United States' Attorney, Hon. Bridget M. Rohde, 271 Cadman Plaza East, Brooklyn, New York 11201, and the Attorney General of the United States, Hon. Jeff Sessions, at the Department of Justice, 10<sup>th</sup> and Constitution Avenue, N.W., Room 4400, Washington, D.C. 20530.

#### **RELEVANT FACTS**

6. At all times material hereto, Decedent Bayron Andino was approximately 7 years old and resided in Hempstead, New York with his mother, Griselda Andino. Infant Decedent Bayron Andino was born January 25, 2009 in San Marcos, Honduras and came to the United States in 2014 with his mother.

7. At all times material hereto, infant Decedent Bayron Andino was covered by the New York State Medicaid program through Health First Child Health Plus.

8. At all times material hereto, the Long Island FQHC, Inc. d/b/a the “Hempstead Family Health Center” operated a medical clinic located at 135 Main Street, Hempstead, New York 11550. The Long Island FQHC, Inc. describes its mission as:

To increase access to comprehensive primary and preventive health care and to improve the health status of the community, especially for the underserved and vulnerable in a financially responsible manner.

Upon information and belief, the clinic known as the “Hempstead Family Health Center” provided pediatric and/or family medicine care, among other services.

9. At all times material hereto, Adedeji Adelaja, D.O. was duly licensed as a physician in the State of New York and maintained a principal place of business at 135 Main Street, Hempstead, New York 11550; and held himself out to the general public as a specialist in the fields of Family Medicine. The American Academy of Family Medicine defines the specialty as follows:

Family medicine is the medical specialty which provides continuing, comprehensive health care for the individual and family. It is a specialty in breadth that integrates the biological, clinical and behavioral sciences. The scope of family medicine encompasses all ages, both sexes, each organ system and every disease entity. (1984) (2016 COD)

10. At all times material hereto, Adedeji Adelaja, D.O. was not acting within the course and scope of his employment at the “Hempstead Family Health Center” when he examined, diagnosed and treated Decedent Bayron Andino beginning in November of 2014 and continuing until February of 2016.

11. At all times material hereto, Adedeji Adelaja, D.O. was not protected from suit pursuant to 28 U.S.C. §1346(b), 28 U.S.C. §2401(b) and 28 U.S.C. §§2679-81, *et seq.* for any negligence when he examined, diagnosed and treated Decedent Bayron Andino beginning in November of 2014 and continuing until February of 2016.

12. At all times material hereto, Adedeji Adelaja, D.O. was not a “Covered Individual” pursuant to the Federally Supported Health Centers Assistance Act of 1992 and 1995 for any negligence when he examined, diagnosed and treated Decedent Bayron Andino beginning in November of 2014 and continuing until February of 2016.

13. At all times material hereto, Long Island FQHC, Inc. d/b/a the “Hempstead Family Health Center” was owned and/or operated by the Nassau Health Care Corporation.

14. At all times material hereto, Long Island FQHC, Inc. d/b/a the “Hempstead Family Health Center” was owned and/or operated by the Nassau University Medical Center.

15. At all times material hereto, Nassau University Medical Center was not a “FTCA Covered Entity” pursuant to the Federally Supported Health Centers Assistance Act of 1992 and 1995.

16. On or about November 25, 2014, Adedeji Adelaja, D.O. examined Decedent Bayron Andino at the clinic known as “Hempstead Family Health Center.” The records of the “Hempstead Family Health Center” concerning Bayron Andino indicate this visit was a “...wellness check...” Additionally, it is noted that “...pt c/o headaches and cold like symptoms at times...” It appears from the record that this history of headaches was elicited by “... j.arias-ma.” The note goes on to state:

HPI:

Historian:

Person here with child today? Mother.

Comments: : 5y10m old Hispanic Male with no significant pmhx here today for routine well child exam. Patient seen today with his mother, denies having any complaints at this time. ...

...ROS

Pediatrics: General negative ... HEENT negative ...Psychiatry negative

...Neurology negative ...

Examination:

Pediatric Exam: ... NEUROLOGIC EXAM: normal cranial nerves II-XII, normal sensory system and reflexes, normal tone and motor development. ...

Assessment:

1. Examination, Well Child – V20.2 (Primary)

In addition to routine blood tests, a skin test was performed to detect Tuberculosis since Bayron had immigrated from Honduras.

17. On or about December 2, 2014, infant Decedent returned to the “Hempstead Family Health Center” to review his Tuberculosis tests and to receive some vaccines. The records indicate Adedeji Adelaja, D.O. was the “Provider” at that visit. On or about December 2, 2014, infant Decedent again returned to the “Hempstead Family Health Center” to review his Tuberculosis skin test. He was seen by a nurse at this visit who noted his skin test to be “...reactive...” and recommended a chest x-ray to detect active Tuberculosis. Once more, the infant Decedent returned to the “Hempstead Family Health Center” on or about December 11, 2014. At this visit, the “Provider” is listed as Diane Lombardy, M.D. The note of the December 11 visit states, in part “...Headache denies...” and the treatment recommendation that day was Isoniazid Syrup to treat any Tuberculosis infection Bayron may have had. A chest x-ray was also performed.

18. On or about December 30, 2014, infant Decedent again returned to the “Hempstead Family Health Center” for further vaccinations. The “Provider” is listed as Adedeji Adelaja, D.O. in the clinic records. The infant Decedent’s complaints that day included “...pt c/o cough, diarrhea, and vomiting past 3 days...” The assessment of that day included “...Viral gastroenteritis...” On or about January 13, 2015, infant Decedent was again taken to the “Hempstead Family Health Center” for “...mother stated concern over child’s cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days...” Adedeji Adelaja, D.O.

diagnosed the infant Decedent as having an upper respiratory infection.

19. On or about February 3, 2015, the infant Decedent was again examined by Adedeji Adelaja, D.O. at the “Hempstead Family Health Center” for a follow-up Tuberculosis examination and further vaccinations. A diagnosis of “Latent Tuberculosis” was made at this visit. On or about May 5, 2015, the infant Decedent returned to the “Hempstead Family Health Center” to see Adedeji Adelaja, D.O. for a further evaluation of his Tuberculosis status. On or about July 9, 2015, infant Claimant developed a rash on his arms and was seen by Diane Lombardy, M.D. at the “Hempstead Family Health Center.” Dr. Lombardy assessed Bayron as having insect bites.

20. On or about August 11, 2015, Adedeji Adelaja, D.O. again examined Bayron Andino at the “Hempstead Family Health Center.” The note of that clinic visit states, in part:

Chief Complaints:

1. \*patient states here for: F/u and mother states patients has cough for 3 days.
2. –Attained by: mmorales, ma.

HPI:

Influenza Questionnaire:

6y6m old Hispanic Male with latent TB s/p treatment here today for foillow up. Patient seen today with his mother, c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother. Spanish interpreter ID #221195 used during encounter.

Dr. Adelaja’s assessment was: “1. Latent tuberculosis by skin test – 795.51 (Primary) 2. Viral URI with cough – 465.9.”

21. On or about September 30, 2015, Adedeji Adelaja, D.O. once again examined Bayron Andino at the “Hempstead Family Health Center.” The note of September 30, states, in part:

Chief Complaints:

1. \*patient states here for: as per mother, patient has rash and itching on his lower back and headache.
2. –Attained by: LCESAR.

HPI:

Influenza Questionnaire:

6y8m old Hispanic Male here today with his mother, c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists. No other associated symptoms as per mother, gave Tylenol with some relief. At the time of visit, patient denies having any headaches. Mother also c/o itchy rash in rectal area, denies any rectal pain or constipation. Spanish interpreter ID#218691 used during encounter.

ROS:

Pediatrics: General negative ... HEENT headache ...

Assessment:

1. Headache – 784.0 (Primary)
2. Rash and nonspecific skin eruption.

The only treatment recommendation Dr. Adelaja made for infant Decedent's headaches was Children's Tylenol.

22. On or about November 13, 2015, infant decedent returned to the "Hempstead Family Health Center." At this visit, he was seen by Kelly Horn, D.O. The note of this visit states, in part:

Chief Complaints:

1. Diarrhea and vomiting.

HPI:

General:

Woke up 2AM with vomiting and diarrhea. Vomited 6 times, diarrhea 4 times since last night. Little PO, tolerating liquids, urinating normally. No fever. Mild headache, no abd pain. ...

Plan:

1. Viral gastroenteritis – A08.4 (Primary)

The only treatment recommendation made was to keep hydrated.

23. On or about November 25, 2015, infant Decedent Bayron Andino had his last visit at the "Hempstead Family Health Center" with Adedeji Adelaja, D.O. The note of that visit states as follows, in part:



Chief Complaints:

1. \*patient states here for: wellness visit, pt mom c/o recurrent dizziness/headaches, vomiting and nausea x 2m. 2-Attained by: M.Richardson MA. 3. Interpreter: john id#208118

HPI:

Historian:

Person here with child today? Mother.

Comments: : 6y10m old Hispanic Male here with his mother for a well child visit. As per mothe, recurrent headaches with associated nausea, vomiting and dizziness. Prior visit in 09/15 for headaches, recommended prn Tylenol which mother states helps, no change in frequency or severity but concerned that it's recurrent. Spanish interpreter ID#221220 used during encounter. ...

ROS:

Pediatrics: General negative ... HEENT headache with associated nausea, vomiting, dizziness, eye pain ... Psychiatry negative ... Neurology headaches ...

Assessment:

1. Well child examination – Z00.129 (Primary)
2. Headache – R51
3. Need for a DTaP vaccine – Z23
4. Influenza vaccine administered – Z23
5. Vaccine for viral hepatitis – Z23

Plan:

1. Well child examination

LAB: Basic metabolic panel

LAB: CBC

LAB: Urinalysis

2. Headache

Refill Tylenol Childrens Suspension ... [Headache in Children: Care Instructions]  
... Mother reassured, continue with Tylenol as needed, adequate hydration/PO intake and return to the health center or hospital if symptoms persist or worsens.

Referral To: Ophthalmology

Reason: recurrent headaches

Referral To: Neurology

Reason: recurrent headaches, apt with pediatric neurology

24. On or about December 24, 2015, infant Decedent Bayron Andino presented to the Pediatric Eye Clinic at Nassau University Medical Center. The ophthalmologist that examined Bayron was Marcelle Morcos, M.D. The medical note that reflects this visit states, in part:

HPI:

Ophthalmology HPI:

\* Chief Complaint:

\* Chief Complaint Details  
PCP

Here for eye exam

6YO otherwise healthy male referred by for eye exam. Per mom, the patient does not seem to have any trouble seeing at home and has no other eye problems. She endorses normal developmental history, but notes he did have a cold a week ago without residual symptoms.

Birth history: Full term, SVD ...

Review of Systems:

\*General: negative: chills, fever ...

\*Neurological: negative: dizziness, headache ...

Assessment and Plan:

\*Assessment/Plan:  
on

-Patient with good visual acuity and ortho exam today but poor stereo vision. Will repeat stereo exam on f/u as ? patient understanding of exam

-No refractive correction warranted at this time

-DFE as above

-Mild C:D asymmetry. Will follow

-Return to clinic for annual exam in one year or sooner as needed

There is no discussion in the Ophthalmology note as to the cause of infant Decedent's headaches.

25. On February 15, 2016, at approximately 1429 hours, Griselda Andino brought infant

Decedent Bayron Andino to the Emergency Department at Nassau University Medical Center.

The Emergency Department record states his history, in part, as:

History of present illness:

Pediatric:

\*Chief Complaint

\*Chief Complaint Details

Vomiting

7yo male patient with 13 days of NBNB vomiting 2-3 times a day that increased to 5 episodes today, not able to tolerate PO (not even for fluids), last one at 2230 hrs and

since

decreased voiding. Associated with epigastric abdominal pain that gets better with vomiting and mild headache in right parietal region yesterday around 2 times a day and weakness.

No fever, no diarrhea, No respiratory symptoms. No sick contacts at home.  
...

ED Course:

\*ED Course:

2 bolus of IVF, was given Zofran for vomiting, 2 episodes of vomiting in the ED

Was sent CBC, CMP.

CBC WBC 7.04, NT 79.6 CMP

WNL

...

ASSESSMENT:

7 yo male with vomiting, PO intolerance and abdominal pain.

1. PO intolerance/vomiting: Pepcid, Zofran PRN.

2. Moderate DH: protocol D5W 0.45%, UA

3. Abdominal pain: Abd X ray, monitor abdominal pain

Attestation:

Faculty Statement:

\*Attestation

\*Remarks

Attending and Resident

Patient was presented to me on rounds at approximately 0700 on Tuesday, February 16<sup>th</sup>. At about 0720, the residents, medical students and I entered the room. When I went to examine the patient who was lying on his side with his back to me. I put my stethoscope on his back but did not hear breath sounds, nor was there chest expansion. I rolled the patient over so he was face up. His mouth was filled with blood tinged saliva and frothy secretions. His nostrils were occluded with frothy

secretions.  
pulses and  
his  
sounds. At this  
pediatric code and  
compressions and  
equipment to begin bag mask  
ventilations. Please see other  
documentation for code details.

I felt for radial and femoral  
there were none. I listened to  
anterior chest for heart  
point I called for a  
we began chest  
located

He was eventually intubated on the floor of Nassau University Medical Center because of  
"...acute respiratory failure..."

26. After 3 days in the Pediatric Intensive Care Unit of Nassau University Medical Center,  
Bayron Andino was pronounced dead on February 18, 2016 at 11:00 am. An autopsy performed  
at Long Island Jewish Hospital on February 22, 2016 listed the following:

#### FINDINGS AND DIAGNOSES

1. Malignant neuroepithelial neoplasm, not further classifiable, arising in cerebellum, with compression of the 4<sup>th</sup> ventricle (2.5 x 2.0 x 1.0 cm)
  - A. Global hypoxic-ischemic encephalopathy
  - B. Cerebral edema (brain weight = 1421g)
  - C. Brain herniation
  - D. Terminal clinical findings ...
  - E. History of headache and intractable nausea and vomiting (clinical) ...

#### CAUSE OF DEATH STATEMENT

Based upon the available clinical history and autopsy findings, the cause of death was:

Global hypoxic-ischemic encephalopathy  
*Due to, or as a consequence of*  
Malignant neuroepithelial neoplasm of cerebellum

Infant Decedent's brain tumor caused an increase in pressure that forced his brain stem to become dysfunctional and his breathing stopped. The respiratory failure caused his global hypoxic-ischemic encephalopathy.

27. "Headache" is defined as pain above the orbitomeatal line.

28. The International Headache Society (IHS) publishes the standardized classification

system that provides diagnostic criteria and classification scheme for headaches in general. In the IHS classification system, headaches are grouped on the basis of origin in order to facilitate evaluation and treatment. The IHS classification system includes the following basic headache types: primary headaches, secondary headaches and cranial neuralgias, central and primary facial pain, and other headaches.

29. Primary headache disorders are those in which the symptoms cannot be attributed to another cause, and they include migraines, tension-type headaches and cluster headaches.

30. Secondary headache disorders are those in which the headache is a symptom of an identifiable structural, metabolic, or other abnormality; etiologies include trauma, neoplasms (tumors), vascular disease, meningitis and infection.

31. The medical evaluation of a child or adolescent presenting with headache requires a thorough history followed by a complete physical and neurological examination.

32. The general physical examination must include determination of vital signs, including blood pressure and temperature. Careful palpation of the head and neck should be performed in a search for sinus tenderness, thyromegaly or nuchal rigidity. Head circumference should be performed. The skin must be examined.

33. A detailed neurologic examination is essential. Key features in children with intracranial disease include altered mental status, abnormal eye movements, optic disc distortion, motor and sensory asymmetry, coordination disturbances, and abnormal deep tendon reflexes.

34. Careful physical and neurologic examinations can enable the physician to exclude organic causes of headache in children.

35. Children with acute evolution of headache accompanied by focal neurologic symptoms or signs (i.e., morning vomiting, headaches that awaken the patient) should be referred to a

pediatric neurologist and neuroimaging should be performed.

36. Infant Decedent Bayron Andino's cause of death was determined to be "malignant neuroepithelial neoplasm of cerebellum." Microscopic examination of the tumor mass indicated it was "high grade" meaning it may grow and spread quickly.

37. The "cerebellum" is the part of the brain at the back of the skull in vertebrates that coordinates and regulates muscular activity.

38. "Neoplasm" means a new and abnormal growth of tissue in some part of the body, especially as a characteristic of cancer.

39. "Neuroepithelial" cells are the "stem cells" of the nervous system, deriving from actual stem cells in several different stages of neural development. These neural stem cells then differentiate further into multiple types of cells, like neurons, astrocytes and other glial cells.

40. "Malignant" in this context means cancerous or able to spread to other parts of the body (as opposed to "Benign" which does not spread).

41. There was no evidence of metastatic spread beyond the cerebellum on autopsy investigation.

42. The treatment for "malignant neuroepithelial neoplasm of cerebellum" is surgical removal.

43. Generally, the size of a "malignant neuroepithelial neoplasm of cerebellum" is proportional to its morbidity and mortality; and, inversely proportional to its survivability.

44. Generally, earlier diagnosis of a "malignant neuroepithelial neoplasm of cerebellum" improves patient outcome.

**AS FOR A FIRST CAUSE OF ACTION: MEDICAL MALPRACTICE**

45. Plaintiff incorporates herein the allegations in paragraphs 1 through 44 as if set out in full.

46. That at all times mentioned herein, Defendant United States of America, by and through its agents, servants and employees, both actual and ostensible, specifically the physicians employed at Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center," Adedeji Adelaja, D.O., Kelly Horn, D.O. and Diane Lombardy, M.D., undertook to attend and provide pediatric medical services to infant Decedent Bayron Andino, beginning on or about November 25, 2014, and continuing thereafter until his death; and, had a non-delegable duty to provide such care to the infant Decedent in a reasonable and prudent manner, and pursuant to contemporary standards of pediatric medicine, and in accordance with Federal and State law.

47. That at all times mentioned herein, Defendant United States of America, by and through its agents, servants and employees, both actual and ostensible, specifically, the physicians employed at Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center," Adedeji Adelaja, D.O., Kelly Horn, D.O. and Diane Lombardy, M.D., were negligent, and departed from standards of good and accepted pediatric medical practice, in its care and treatment of infant Decedent Bayron Andino by the following:

- 1) On November 25, 2014, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported that "...pt c/o headaches and cold like symptoms at times...;"
- 2) On November 25, 2014, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported that "...pt c/o headaches and cold like symptoms at times..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his first medical contact in the United States;
- 3) On November 25, 2014, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or

"Secondary" according to the diagnostic criteria published by the International Headache Society;

- 4) On November 25, 2014, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 5) On November 25, 2014, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 6) On November 25, 2014, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 7) On December 2, 2014, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported that "...pt c/o headaches and cold like symptoms at times..." and was possibly infected with Tuberculosis based upon a positive PPD skin test;
- 8) On December 2, 2014, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported that "...pt c/o headaches and cold like symptoms at times..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his second medical contact in the United States and was possibly infected with Tuberculosis based upon a positive PPD skin test;
- 9) On December 2, 2014, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society and was possibly infected with Tuberculosis based upon a positive PPD skin test;
- 10) On December 2, 2014, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints and was possibly infected with Tuberculosis based upon a positive PPD skin test;
- 11) On December 2, 2014, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes and was possibly infected with Tuberculosis based upon a positive PPD skin test;
- 12) On December 2, 2014, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;



- 13) On December 11, 2014, Diane Lombardy, M.D. failed to perform a complete neurologic exam on Bayron Andino even though it was reported that "...pt c/o headaches and cold like symptoms at times..." in previous notes and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his third medical contact in the United States and was presumed infected with Tuberculosis based upon a positive PPD skin test;
- 14) On December 30, 2014, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at a previous visit that "...pt c/o headaches and cold like symptoms at times..." and now complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days...;"
- 15) On December 30, 2014, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at a previous visit that "...pt c/o headaches and cold like symptoms at times..." and now complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days...;" and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his fourth medical contact in the United States;
- 16) On December 30, 2014, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 17) On December 30, 2014, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 18) On December 30, 2014, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 19) On December 30, 2014, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 20) On January 13, 2015, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days...;"

- 21) On January 13, 2015, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over childs cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his fifth medical contact in the United States;
- 22) On January 13, 2015, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 23) On January 13, 2015, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 24) On January 13, 2015, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 25) On January 13, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 26) On February 3, 2015 and May 5, 2015, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now "...mother stated concern over childs cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made;
- 27) On February 3, 2015 and May 5, 2015, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over childs cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his sixth and seventh medical contact in the United States, and a diagnosis of latent Tuberculosis was made;

- 28) On February 3, 2015 and May 5, 2015, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 29) On February 3, 2015 and May 5, 2015, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 30) On February 3, 2015 and May 5, 2015, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 31) On February 3, 2015 and May 5, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 32) On July 9, 2015, Diane Lombardy, M.D. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made, and now had developed a rash on his arms;
- 33) On July 9, 2015, Diane Lombardy, M.D. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his eighth medical contact in the United States, and a diagnosis of latent Tuberculosis was made, and now had developed a rash on his arms;
- 34) On July 9, 2015, Diane Lombardy, M.D. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 35) On July 9, 2015, Diane Lombardy, M.D. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;

- 36) On July 9, 2015, Diane Lombardy, M.D. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 37) On July 9, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 38) On August 11, 2015, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and "...mother stated concern over childs cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms; and now "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;"
- 39) On August 11, 2015, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over childs cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his ninth medical contact in the United States, and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms, and now "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;"
- 40) On August 11, 2015, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 41) On August 11, 2015, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 42) On August 11, 2015, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 43) On August 11, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead

Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;

- 44) On September 30, 2015, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms; and "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" and now "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists...;"
- 45) On September 30, 2015, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his tenth medical contact in the United States, and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms, "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" and now "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists...;"
- 46) On September 30, 2015, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 47) On September 30, 2015, Adedeji Adelaja, D.O. failed to refer Bayron to a Pediatric Neurologist to evaluate his headache complaints;
- 48) On September 30, 2015, Adedeji Adelaja, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 49) On September 30, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead



Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;

- 50) On November 13, 2015, Kelly Horn, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms; and "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists..." and now "...Woke up 2AM with vomiting and diarrhea. Vomited 6 times, diarrhea 4 times since last night. Little PO, tolerating liquids, urinating normally. No fever. Mild headache, no abd pain...;"
- 51) On November 13, 2015, Kelly Horn, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his tenth medical contact in the United States, and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms, "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" and "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists..." and now "...Woke up 2AM with vomiting and diarrhea. Vomited 6 times, diarrhea 4 times since last night. Little PO, tolerating liquids, urinating normally. No fever. Mild headache, no abd pain....;"
- 52) On November 13, 2015, Kelly Horn, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 53) On November 13, 2015, Kelly Horn, D.O. failed to refer Bayron to a

Pediatric Neurologist to evaluate his headache complaints;

- 54) On November 13, 2015, Kelly Horn, D.O. failed to refer Bayron for a head MRI to rule-out "Secondary" causes;
- 55) On November 13, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;
- 56) On November 25, 2015, Adedeji Adelaja, D.O. failed to elicit a thorough history of Bayron's headaches including mode of onset, duration, severity and associated symptoms even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and complaining of "...pt c/o cough, diarrhea, and vomiting past 3 days..." and "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms; and "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists..." and now "...Woke up 2AM with vomiting and diarrhea. Vomited 6 times, diarrhea 4 times since last night. Little PO, tolerating liquids, urinating normally. No fever. Mild headache, no abd pain..." and now "...As per mother, recurrent headaches with associated nausea, vomiting and dizziness. Prior visit in 09/15 for headaches, recommended prn Tylenol which mother states helps, no change in frequency or severity but concerned that it's recurrent...;"
- 57) On November 25, 2015, Adedeji Adelaja, D.O. failed to perform a complete neurologic exam on Bayron Andino even though it was reported at previous visits that "...pt c/o headaches and cold like symptoms at times..." and "...pt c/o cough, diarrhea, and vomiting past 3 days..." and now complaining of "...mother stated concern over child's cough, congestion, snoring (sounds like pt was choking) vomiting and fever x2 days..." and that Bayron had immigrated from Honduras recently; and thus exposed to a host of diseases, both infectious and metabolic, and this was his eleventh medical contact in the United States, and a diagnosis of latent Tuberculosis was made, and had developed a rash on his arms, "c/o dry cough with associated headaches for the last 4 days. No fever, chills, nausea, vomiting, nasal discharge, night sweats or sick contacts as per mother;" and "...c/o intermittent headaches for the last few days. As per patient, patient had cold like symptoms about 5 days ago that has since resolved but mild headaches still persists..." and "...Woke up 2AM with

vomiting and diarrhea. Vomited 6 times, diarrhea 4 times since last night. Little PO, tolerating liquids, urinating normally. No fever. Mild headache, no abd pain..." and now "...As per mothe, recurrent headaches with associated nausea, vomiting and dizziness. Prior visit in 09/15 for headaches, recommended prn Tylenol which mother states helps, no change in frequency or severity but concerned that it's recurrent...;"

- 58) On November 25, 2015, Adedeji Adelaja, D.O. failed to determine whether Bayron's complaints of headaches were "Primary" or "Secondary" according to the diagnostic criteria published by the International Headache Society;
- 59) On November 25, 2015, Adedeji Adelaja, D.O. failed to refer Bayron to an immediate Pediatric Neurologist visit to evaluate his headache complaints;
- 60) On November 25, 2015, Adedeji Adelaja, D.O. failed to refer Bayron for an immediate head MRI to rule-out "Secondary" causes;
- 61) On November 25, 2015, Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center" failed to promulgate a written policy & procedure concerning the evaluation of pediatric patients complaining of recurrent headaches;

Additionally, Defendant United States of America failed to properly train and supervise its agents, servants and employees in the provision of pediatrics, surgery and general medical care to the Plaintiff.

48. Under the laws of the State of New York, a private person would be liable to Plaintiff, in his capacity of Administrator of the Estate of Bayron Andino, for these acts and/or omissions of medical malpractice. Under 28 U.S.C. §2674, the United States of America is liable to Plaintiff for damages resulting from the personal injuries delineated below.

49. That as a result of the negligence and departures of the Defendant, its agents, servants and/or employees, whether taken singularly or in combination, and within a reasonable degree of medical probability, the infant Decedent was proximately caused to sustain serious, severe and permanent personal injuries, and Defendant's negligence was a substantial contributing factor to



such injuries, specifically the following:

- 1) Premature death/diminution of lifespan;
- 2) Pre-death, conscious pain, suffering and distress; and,
- 3) Lost chance of survival and/or cure.

50. That as a result of the negligence and departures of the Defendant, its agents, servants and/or employees, whether taken singularly or in combination, the infant Decedent Bayron Andino and the Estate of Bayron Andino, was caused to suffered economic damages, both in the past and continuing into the future, actually and proximately caused by the departures and negligence of the Defendant herein resulting in lien(s) (equitable or legal) and/or a "Right of Recovery" by private or governmental health insurance programs that paid for medical care on behalf of Decedent for injuries caused by the Defendant herein; specifically New York State Medicaid.

51. That the injuries and damages sustained by Plaintiff were caused solely by the torts of the Defendant, without any negligence on the part of any other person contributing thereto.

**AS A SECOND CAUSE OF ACTION: WRONGFUL DEATH**

52. Plaintiff incorporates herein the allegations in paragraphs 1 through 51 as if set out in full.

53. That at all times mentioned herein, Defendant United States of America, by and through its agents, servants and employees, both actual and ostensible, specifically, the physicians employed at Long Island FQHC, Inc. d/b/a the "Hempstead Family Health Center," Adedeji Adelaja, D.O., Kelly Horn, D.O. and Diane Lombardy, M.D., were negligent, and departed from standards of good and accepted pediatric medical practice, in its care and treatment of infant Decedent Bayron Andino.

54. Defendant's departures, whether taken singularly or in combination, were a direct and proximate cause of infant Decedent's premature death.

55. At the time of Decedent's death, he was expected to provide pecuniary support to his mother and natural guardian Griselda Andino in the future upon gaining employment. Pursuant to §5-4.3 of the Estates, Powers and Trusts Law of the State of New York, the infant Decedent's family has been wrongfully deprived of said financial support and has otherwise been caused to be damaged thereby, including the suffering of pecuniary damages, expenses and funeral costs.

56. The Estate of Bayron Andino has suffered economic damages, actually and proximately caused by the departures and negligence of the Defendants herein resulting in lien(s) (equitable or legal) and/or a "Right of Recovery" by private or governmental health insurance programs that paid for medical care on behalf of Decedent for injuries caused by the Defendants herein.

57. The injuries and damages sustained by infant Decedent and his Estate were caused solely by the torts of the Defendant, without any negligence on the part of any other person contributing thereto.

**STATEMENT REGARDING EXCEPTIONS IN NEW YORK STATE**  
**CPLR ARTICLE 1602**

58. One or more of the exceptions in CPLR §1602, including but not limited to subsection 2 (iv) and 7 are applicable to all causes of action and defendants are jointly and severally liable with all other tortfeasors whether parties to this action or not.

WHEREFORE, Plaintiff demands judgment against the Defendant for actual damages on each of the causes of action not to exceed \$5,000,000.00, with interest from the time of death, costs and disbursements as permitted by law, and such further relief as justice demands.

Dated: New York, New York  
August 25, 2017

Yours, etc.,

A handwritten signature in cursive script, appearing to read "Howard Cohen", written over a horizontal line.

WILLIAM SCHWITZER & ASSOCIATES, P.C.

By: Howard Cohen (HC7640)

Attorneys for Plaintiff

820 2<sup>nd</sup> Avenue, 10<sup>th</sup> Floor

New York, New York 10017

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JEFFREY DELUCA, the Public Administrator of Nassau  
County, New York, as Administrator of the Estate of  
BAYRON ANDINO

Plaintiff,

-against-

THE UNITED STATES OF AMERICA

CERTIFICATE OF MERIT

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK)

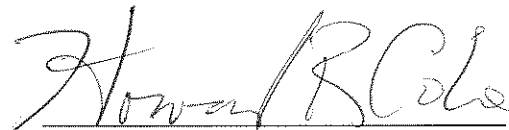
Howard R. Cohen, an attorney duly admitted to practice before the courts of the State of New York, deposes and says:

1. That I am an associate of the law firm of William Schwitzer & Associates, P.C., attorneys of record for the plaintiff in the above-captioned matter. I am fully familiar with the facts and circumstances of this matter by virtue of the file maintained by my office.

2. That I have reviewed the facts of the case with a physician who is duly licensed to practice medicine and who, I believe, is knowledgeable in the relevant issues involved in the case.

3. As a result of the aforementioned review, I have concluded that there is a reasonable basis for the commencement of this malpractice action.

Dated: New York, New York  
August 25, 2017

  
Howard R. Cohen (HC7640)